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CHONG SU KONG & ORS

v.

SIA HIONG YEE & ORS

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[CASE NO: K21-5-2006-I]
29 APRIL 2010

C ***EVIDENCE:*** *Burden of proof - Forgery of signatures - Allegation of Signatures forged on power of attorney - Whether burden on plaintiffs to prove - Standard of proof - Whether achieved - Evidence Act 1950*

LAND LAW: *Power of Attorney - Rights and interests on grant of - Presumption raised in s. 85 of the Evidence Act - Whether rebutted by* D *plaintiffs - Direct and expert evidence - Effect of - Failure to rebut - Whether there had been a necessity to call the commissioner of oaths - Factors considered - Evidence Act 1950, s. 85*

LAND LAW: *Sale of land - Bona fide purchaser - Whether defendants* E *bona fide purchasers of the land for value - Evidence adduced by parties - Effect of - Whether satisfied by the defendants on a balance of probability*

LAND LAW: *Title - Indefeasibility of title - Immediate and deferred* F *indefeasibility - Meaning of - Provisions of the National Land Code and case law - Effect of - Land in relation to the Sabah Land Ordinance - Whether provisions of National Land Code similar to Sabah Land Ordinance - Effect of - Statutory intervention - Whether there was statutory intervention provision in the Sabah Land Ordinance - Effect of* G *- National Land Code, s. 340*

LAND LAW: *Title - Indefeasibility of title - Provisions of the Sabah Land Ordinance - Whether a modified Torrens system - Effect of - Whether immediate or deferred indefeasibility - No case law on the issue* H *in this part of the world - Effect of - Point of view- Sabah Land Ordinance s. 88 & Land Transfer Act 1952 (New Zealand) s. 183*

TORT: *Damages - Negligence - Indemnity - Defendants seeking an indemnity from the third party - Whether third party owed the defendants a duty of care - Whether third party liable to defendants in tort - Third*

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party allegedly representing the plaintiffs in the fraudulent S&P - Effect of - Whether there had been a relationship of proximity between the Third party and the defendants in relation to the S&P - Effect of - Whether party who owed defendants a duty of care in relation to fraudulent S&P a party to proceedings

The plaintiffs, as registered owners of land measuring 25 acres located in the district of Menggatal, Kota Kinabalu ('land'), had intended to sell it. One Tong Chung Hing ('Tong') informed them that one Ling ('Ling') was interested to purchase the land. Thus, the title deed of the land was given to Ling for valuation purposes. It was subsequently discovered that the defendants had become the registered owners of the said land by virtue of a sale and purchase agreement dated 12 February 2004 ('S&P') entered into between the defendants, the 7th plaintiff signing on his own behalf and the 1st to the 6th plaintiffs pursuant to a power of attorney allegedly given by them to the 7th plaintiff. The plaintiffs alleged that the signatures in the S&P, the power of attorney, the memorandum of transfer and the PDS 15 Forms in relation to the said land had been forged. The defendants had also filed a third party claim against Ms Johari & Zaleha ('third party') for negligence in handling the S&P. There were two main issues that arose for determination before the court: (i) whether the signatures of the plaintiffs in the S&P, the power of attorney, the memorandum of transfer and the PDS 15 Form in respect of the said land had been forged and (ii) whether the third party had been negligent in handling the S&P transaction of the land resulting in the defendants' loss.

Held (allowing plaintiffs' claim; dismissing defendants' claim against third party):

(1) The plaintiffs' case had been one of forgery and the standard of proof had been on a balance of probability. The burden of proof had been on the plaintiffs. (para 5)

(2) The presumption raised in s. 85 of the Evidence Act 1950 had been rebutted by the plaintiffs and they had relied on their own evidence and that of the expert evidence of PW10 and PW11. Even if the plaintiffs could have shown on a balance of probability that one of them had not signed the power of attorney, the said power of attorney would have been invalid as the intent of such a document had to be joint and could not be severed as the plaintiffs had all been co-owners of the land. (para 9)

(3) On the defendants' contention that in order for the plaintiffs to rebut the presumption, they had to call the commissioner of oaths, there was no law which had prescribed this. It had been a matter of choice for the plaintiffs to determine their mode of proof. Accordingly, such a contention had been without merit. (para 10)

(4) There was direct evidence from the plaintiffs that they had not signed the power of attorney and this was corroborated by the unchallenged evidence of the experts called by the plaintiffs, PW10 and PW11 respectively. The expert reports had been quite unequivocal in stating that the plaintiffs had not signed the relevant documents and they had not been challenged in any way by the defendants. Thus it would be accepted by the court. The fact that the defendants had paid unknown parties to the plaintiffs for the purchase of the land, had further corroborated the plaintiffs' version that their signatures had been forged and that they had been the subject of a scam. At this juncture, the burden had shifted to the 1st to the 4th defendants to disprove the plaintiffs' case, which they had failed to do. Thus, the power of attorney had been invalid on the ground that the plaintiffs' signatures had been forged. (para 11)

(5) The defendants had relied on the concept of *bona fide* purchaser for value without notice. The law had required them to prove on a balance of probability that they had in fact been purchasers for value without notice. Counsel for the plaintiffs had rebutted the 1st to the 4th defendant's contentions on several grounds but those grounds or factors had not negatived the reasons given by defendants. Thus, the defendants had been *bona fide* purchasers for value without notice. (paras 12 & 14)

(6) On the issue of whether the title had been indefeasible, immediate and deferred indefeasibility had clearly been explained by Ariffin Zakaria CJM in the case of *Tan Ying Hong*. The principle of immediate indefeasibility as expounded in the *Adorna* case in relation to s. 340 of the National Land Code ('NLC') had since been held to be bad in law in view of the *Tan Ying Hong* case. The question had been, in relation to the Sabah Land Ordinance ('SLO'), whether the concept of indefeasibility or deferred indefeasibility applied.

There had not been any provision for the indefeasibility of title on registration in the SLO similar to that of s. 340 of the NLC. Thus what had been stated in Tan Ying Hong could not be adopted or used to determine what type of indefeasibility the SLO had envisaged. As rightly pointed out by the learned judge in the *Ngui Yu Thau* case, it had not made a difference when there had been a forged instrument for the reasons stated by Gopal Sri Ram JCA in the *Adorna* case. Thus one could deduce that unless there had been statutory intervention, title obtained by forgery would be a void instrument. Hence irrespective of whether the purchaser had been an immediate or subsequent one, he or she acquired no right. Parliament had seen fit to create this concept of indefeasibility and s. 340 of the NLC had been a perfect example of statutory intervention. (paras 15 & 17-21)

(7) Unfortunately, there had not been such direct intervention in the SLO. In *Borneo Housing Mortgage Finance Bhd*, the Federal Court held that the SLO had been a modified Torrens system. The concept of indefeasibility has been entrenched in a Torrens system and since the SLO though modified had still been a Torrens system, the concept of indefeasibility through s. 88 of the SLO could be said to be part of the SLO regime. What had not been clear had been whether it had been immediate or deferred indefeasibility. Research had revealed that there had not been any decided cases on this issue in this part of the world but the case of *Gibbs* had justified the concept of deferred indefeasibility and it would be adopted here. (*Subramaniam Alvin Leong NS Dhurai*). (paras 21-23)

(8) The SLO should be interpreted to embrace the concept of deferred indefeasibility and that was because it would not be in the interests of the country's trade and commerce if we had a different set of laws for the state of Sabah to that of Peninsular Malaysia especially in relation to land matters. Although the court had been discouraged from using policy considerations in interpreting statutes, this was one instance where the exception to the rule should apply. (para 25)

(9) There was no dispute that the defendants had been dealing with the forger in getting themselves registered as legal owners and in applying the deferred indefeasibility concept, it was held that the title of the defendants to the land had been defeasible. (para 26)

(10) In a forgery of this nature, one innocent party was bound to suffer. It was either the registered owner or the *bona fide* purchaser for value without notice. The relevant authority should seriously look into the setting up of an assurance fund to compensate for any loss to any innocent purchasers resulting from forgery similar in this case and to the *Adorna* case. Only with this fund can one say that the Torrens system guarantees the absolute and indefeasible title of a registered owner. This fund can be funded by the users of the Land Registry by imposing a levy of say a sum of RM10 for each transaction. In the context of the SLO, the relevant authority should seriously look into amending the SLO to include a specific provision on 'indefeasibility of registered title' so that the State would have a truly Torrens system as opposed to a modified Torrens system which is neither here nor there. (paras 28 & 29)

(11) The Third party had been made a party to this suit by the defendants and their claim had been basically to seek indemnity for any loss they could suffer in the event the claim resulted in favour of the plaintiffs. It had been undisputed that both the plaintiffs and the defendants had engaged different solicitors to act for them in respect of the S&P. The Third party had acted for the plaintiffs (though denied by the plaintiffs) whilst DW2 had acted for the defendants. As such, the third party had not owed any duty of care either in tort or in contract to the defendants. Thus the claim by the defendants against the Third party had been misplaced and would accordingly be dismissed with costs. (paras 30-33)

Case(s) referred to:

Abrath v. North Eastern Railway Co [1883] 11 QBD ***(refd)***

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***

Boonsoom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***

Borneo Housing Mortgage Finance Berhad v. Times Engineering Berhad [1996] 2 CLJ 561 FC ***(refd)***

Doshi v. Yeoh Tiong Lay [1974] 1 LNS 30 FC ***(refd)***
Frazer v. Walker and Others [1967] 1 All ER 649 ***(refd)***
Gibbs v. Messer [1891] AC 248 ***(refd)***
Ng Thau Shing v. George Justine & Other Cases [2005] 6 CLJ 80 HC ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
Selvaduray v. Chinniah [1939] 1 LNS 107 HC ***(refd)***
Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors [2005] 3 CLJ 539 CA ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***
United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 85
Land Ordinance (Cap 68) (Sabah), s. 88
National Land Code, s. 340(3)

Land Transfer Act 1952 [NZ], s. 183(1)

For the plaintiff - Roland Cheng; M/s Roland Cheng & Co
For 1st – 4th defendant - Richard Barnes (Kevin Wong with him); M/s Shelley Yap
For 5th defendant - Sabah State Attorney General Chambers, Kota Kinabalu, Sabah
For 3rd party - Mohd Noor Yusof; M/s Johari & Zelika

Reported by Sharmini Pillai

JUDGMENT

David Wong Dak Wah J:

Proceeding

[1] The plaintiffs' claim is to set aside the registration and transfer of their parcel of land measuring 25 acres located in the district of Menggatal, Kota Kinabalu (land) to the 1st to 4th defendant on the ground that the 1st and 6th plaintiff had never executed the power of attorney in favour of the 7th plaintiff and that the 7th plaintiff never signed the sale and purchase agreement dated 19 March 2004 with the 1st and 4th defendant (defendants). The defendants denied the claim on the ground that they were not aware of any forgery (if any) and are *bona fide*

purchasers for value without notice. The defendants have also filed a third party claim against Ms Johari & Zeleha (Third party) for negligence in handling the sale and purchase of the land. The 5th defendant is represented by the State Attorney General and has agreed to be bound by the decision of the court.

Background Facts

[2] The plaintiffs were the registered owners of the land and the custody of the title deed of the land was with the 2nd plaintiff (now deceased) until it was given to the 7th plaintiff allegedly for valuation purposes. It is not disputed that the 7th plaintiff had intended to sell the land and for that purpose he informed one Tong Chung Hing (Tong) that he may be agreeable to a sale price of RM2.53 million. Tong later informed the 7th plaintiff that a certain Mr Ling was interested to purchase the land for RM2.53 million and is willing to pay in cash after Mr Ling had seen the original title and had valued the land. Upon the request of Tong, the 7th plaintiff gave the title deed to the land to Mr Ling for valuation purposes but the title deed was never returned back to the 7th plaintiff. It was allegedly discovered later that the defendants had become the registered owners by virtue of a sale and purchase agreement dated 19 March 2004 with the 7th plaintiff signing for himself and on behalf of 1st to 6th plaintiff pursuant to a power of attorney which the 1st to 6th plaintiff had allegedly given to 7th plaintiff.

[3] All the plaintiffs allege that their signatures in the sale and purchase agreement dated 19 March 2004, the power of attorney dated 12 February 2004, the memorandum of transfer dated 25 March 2004 and PDS 15 Form were forged.

Issues

[4] From the evidence adduced and the submissions by counsel there are in my view two issues:

(a) Were the signatures of the plaintiffs in the sale and purchase agreement dated 12 February 2004, the power of attorney dated 19 March 2004, the memorandum of transfer dated 25 March 2004 and PDS 15 Form forged?

(b) Whether the third party was negligent in the handling of the sale transaction of the land resulting the defendants' loss?

Issue 1

Were The Signatures Of The Plaintiffs In The Sale And Purchase Agreement Dated 12 February 2004, The Power Of Attorney Dated 19 March 2004, The Memorandum Of Transfer Dated 25 March 2004 And PDS 15 Form Forged?

[5] The plaintiffs' case is one of forgery and the standard of proof is 'on the balance of probability' as held by the then Supreme Court in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31, where Anuar J (later CJ, Malaya) said:

> Another important matter has been raised by the appellant in connection with the issue of forgery. It was argued for the appellant both in the Court below and before us that the standard of proof required in cases such as this should be beyond a reasonable doubt and *Syarikat Perkapalan Timor v. United Malayan Banking Corp Bhd* [1982] 2 MLJ 193 was cited in support. We have examined this decision with some care but we are unable to agree with the appellant's Counsel that it is authority for the proposition that is put forward for the appellant. In our judgment, a customer who alleges that his banker honoured forged cheques drawn on his account need only establish the charge of forgery on a balance of probabilities and in this respect, we agree with the statement of the law by Gunn Chit Tuan J (as he then was) in *Syarikat Islamiyah v. Bank Bumiputra Malaysia Bhd* [1988] 3 MLJ 218 where at p. 220 the learned Judge said:
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> > In this case although it would appear that there was no or insufficient evidence to prove beyond reasonable doubt for purposes of criminal proceedings that the signatures on the cheques concerned were forged by the said Awang alias Che Mah bin Che Lob, yet I was satisfied that there was evidence adduced to prove on a balance of probabilities in this case that the signatures on the cheques were not those of the plaintiff's but were forged or placed thereon without the plaintiff's authority and were therefore wholly inoperative. We are therefore of the opinion that the learned Judge did not misdirect himself on the measure of proof that is required to bring home a case of forgery on the facts of such a case as the one before us.

[6] The burden of proof is of course on the plaintiffs. That burden is clearly explained by Terrel Ag CJ in *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253, at p. 255 where he referred to the case of *Abrath v. North Eastern Railway Co* [1883] 11 QBD and it reads as follows:

> But then it is contended (I think fallaciously), that if the plaintiff has given *prima facie* evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to it. It seems to me that the propositions ought to be stated thus: the plaintiff may give *prima facie* evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts: the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer; if they are, they must find for the plaintiff; but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff; they must find for the defendant. Then comes this difficulty – suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

[7] That said I am fully aware that my duty is to apply my judicial mind in evaluating the evidence and what that means is stated by Gopal Sri Ram in *Boonsoom Boonyanit v. Adorna Properties Sdn. Bhd* [1997] 3 CLJ 17:

> It is trite that, apart from applying the standard of proof required by law, a trier of fact, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. A decision arrived in the absence of a judicial appreciation of evidence is liable to appellate correction. Judicial appreciation is concerned with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence, assigning such

weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses.

Evaluation Of Evidence

[8] With that I now evaluate the evidence before me. I start off with s. 85 of the Evidence Act 1950 which learned counsel for the defendants relies on and it reads as follows:

> The Court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a Notary Public or Commissioner for Oaths, or any court, Judge, Magistrates, or consular office of Malaysia was so executed and authenticated"

[9] That presumption of course can be rebutted by the plaintiffs and in attempting to do so they had relied on their own evidence and the expert evidence of PW10 and PW11. On this aspect I should first deal with the evidence of PW2 which counsel for the plaintiffs contends that there is an admission by the defendants that he did not sign the power of attorney. With respect I prefer the contention of counsel for the defendants that there was in fact no admission for the simple reason that PW2 was not even well enough to be sworn in let alone cross examined. However I concede that even if the plaintiffs can show on a balance of probability that only one of the plaintiffs did not sign the power of attorney, the power of attorney is invalid. In my view the intent of such power of attorney must be a joint one and cannot be severed as the plaintiffs are all co owners of the land.

[10] The next contention which I wish to deal with is the defendants' contention that for the plaintiffs to rebut the presumption they must call the commissioners of oath – one Bujang Saie bin Ahmad. Such argument was made in the case of *Boonsoom Boonyanit v. Adorna Properties Sdn Bhd (supra)*. The facts there were these. The appellant, a Thai national, was the registered proprietor of a land in Tanjung Bungah, Pulau Pinang. Pursuant to a fraudulent scheme, she found out that her land was transferred and registered in the name of the respondent. She took out a legal action to set aside the transfer of the land and the ground was that her signature had been forged on the memorandum of transfer. In proving her case, she had relied on her absence from Malaysia when the transfer was effected and

proof that the Thai passport used by the perpetrator was forged. Counsel for the respondent there had raised the fatalness of the failure on the part of the appellant to call the commissioners of oath as a witness. The Court of Appeal through the judgment of Gopal Sri Ram JCA (as he then was) discusses the contention:

> There are two other matters that arise from the judgment of the learned Judge and call for comment. First, in the passage which we have reproduced from his judgment, the Judge relied on the failure of the appellant to call Arifin Awang, the Penolong Pentadbir Tanah who attested the impugned memorandum of transfer and the attending solicitor from M/s. Khor, Ong & Co. as her witnesses to prove her case.
>
> Mr. Lim Kean Siew has argued that the learned Judge was clearly wrong in this respect because there was no obligation on the appellant to call these persons. He says that the evidence led by the appellant upon the issue of forgery was sufficient and that it was up to the respondent to call these two individuals if it wished to disprove the appellant's case.
>
> We are in agreement with these submissions. The appellant had, at the close of her case, by means of cogent evidence, both direct and circumstantial, brought home the allegation of forgery. There was no rebuttal from the respondent upon any of the salient points raised by the appellant. Yet, it appears that there was no recognition of these matters by the learned Judge anywhere in his judgment. The language employed by him makes it plain that he drew an adverse inference against the appellant for her failure to call the two persons aforementioned - the Penolong Pentadbir Tanah and the attending solicitor for the purported vendor - because of what he perceived to be the higher standard of proof that the law placed upon the appellant.
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> Second, the learned Judge found against the appellant on the footing that she ought to have called a "signature expert" (we think he meant a handwriting expert or qualified document examiner) to prove her case instead of relying on what he erroneously perceived to be an *alibi*. In this he was wrong, because he failed to appreciate that there was direct evidence from the appellant's son that the signature appearing on the impugned instrument of transfer was not that of the appellant. This evidence came as a result of cross-examination by Counsel for the respondent. It was then not suggested to the witness while still under crossexamination that he was wrong or that he was unfamiliar with his mother's handwriting or usual signature.

[11] Similarly in the present case, the plaintiffs had chosen to prove the forgery by direct evidence of the plaintiffs and experts. And it is then up to the court to determine whether they are enough for the plaintiffs to prove their case. There is no law which prescribes that the plaintiffs must call the commissioner of oath to prove their case. It is a matter of choice for the plaintiffs to determine their mode of proof. Accordingly I find the contention to be without merit. That said I now proceed to analyze the evidence of the plaintiffs. In my view there is direct evidence from the plaintiffs themselves that they did not sign the power of attorney which had been corroborated by the unchallenged evidence of the experts called by the plaintiffs in PW10 and PW11. It can be said that the expert reports had been quite unequivocal in stating that the plaintiffs did not sign the relevant documents. And when they are not challenged in any way by the defendants, the court though not bound by the opinions of the experts should accept the evidence unless cogent reasons are provided. Here no cogent reasons had been produced by the defendants; hence I have no hesitation in accepting the evidence of the experts. Furthermore the fact that the disbursement of the consideration paid by the defendants for the purchase of the land was not to any of the plaintiffs but to people not known to the plaintiffs corroborates the plaintiffs' version that their signatures had been forged and they had been the subject of a scam. Accordingly at this juncture the burden shifts to the 1st to 4th defendant to disprove the plaintiffs' case. They have failed in my view when they did not attempt to discredit the evidence of the PW10 and PW11. Hence I find that the power of attorney is invalid on the ground that the signatures of the plaintiffs had been forged.

Bona Fide Purchaser For Value Without Notice

[12] This brings me to the defendants' reliance on the concept of *bona fide* purchaser for value without notice. The law requires them to prove on a balance of probability that they were in fact purchasers for value without notice. (see *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793). In proving this, counsel for the defendants relies on the following factors:

(a) The 1st defendant only knew of the sale of the property from a newspaper advertisement.

(b) The 1st defendant had made a formal search of the property at the Central Land office.

(c) The 1st defendant had over the years been purchasing lands in the Menggatal and Inanam area totalling not less than 100 acres.

(d) The purchase price of RM1.2 million for the property is the true market price as corroborated by the valuation of the property by the Federal valuer for the purpose of stamp duty.

(e) The legal documents to the transaction were handled by two set of lawyers in the third party herein and Mr Ting Sing Chuan - DW2.

(f) There was no rush to complete the transaction as the balance of 90% of purchase price was not paid until such time that the defendants were registered as owners.

[13] Counsel for the plaintiffs rebuts the 1st to 4th defendant's contention and relies on the following factors:

(a) The 1st defendant took no steps to verify Ah Tong had the authority to deal with the property.

(b) No step was taken by the 1st to 4th defendant to value the property.

(c) The release of RM50,000 without consulting their lawyer gives rise to suspicion.

(d) The fact that the power of attorney was prepared by Messrs Johari & Zelika should have given rise to suspicion.

[14] With respect to counsel for the plaintiffs, the above factors do not negative the reasons given by the defendants. Ah Tong was only a facilitator to the transaction and there is no evidence that he was in cohort with the defendants. As for the non valuation, I accept the unrebutted evidence that 1st defendant knew the area where the property was situated well and did not require a valuation report to know the market value. In any event the plaintiffs had not produced any valuation report that the property in fact was worth much more than RM1.2 million. On the contrary, the valuation for stamp duty purpose confirms that the market value is in fact RM1.2 million. Accordingly I find that the defendants are *bona fide* purchasers with value and without notice.

Indefeasibility Of The Title Of The 1st To 4th Defendant

[15] Having found that the defendants are *bona fide* purchasers with value and without notice, I am now confronted with the issue of whether their title to the property is indefeasible.

[16] My starting point in dealing with this issue must be the Federal Court case of *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 where it held that s. 340 of National Land Code created the concept of an immediate as opposed to deferred indefeasibility. It would be instructive to set out s. 340 of the NLC:

> 340. Registration to confer indefeasible title or interest, except in certain circumstances.
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s. (2):
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested.

A Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

B **[17]** What is immediate and deferred indefeasibility is clearly explained by the Ariffin Zakaria CJM in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 at p. 284 as follows:

[20] Indefeasibility can be immediate or deferred. The distinction between the two is well explained in para 404 of *The* C *National Land Code, A Commentary* (Vol 2) by Judith Sihombing which reads:

> There are two types of indefeasibility; immediate and deferred. The factor which distinguishes the two is the common law effect given to the instrument even after D registration; in addition; in a regime of deferred indefeasibility, the role of registered volunteer might be more relevant than under an immediate indefeasibility system. If, after registration has occurred, the system then ignores the substance, form and probity of the instrument used to support the registration, the system E is likely that of immediate indefeasibility. Thus, registration has cured any defect in the instrument being registered. If the instrument, despite registration, still has the power to affect the registered interest or estate, the system will probably be that of deferred indefeasibility.

F

[21] In short, immediate indefeasibility means that the immediate registered title or interest of the proprietor or transferee immediately to the vitiating circumstances will be conferred statutory protection despite the existence of any vitiating circumstances. In the case of deferred indefeasibility, the G indefeasibility only comes to be attached to the title or interest upon a subsequent transfer. Thus, the difference between immediate and deferred indefeasibility hinges on the effect of registration vis a vis the title or interest.

H [22] Before the decision of *Adorna Properties* the prevailing view was that s. 340 of the NLC confers deferred indefeasibility as opposed to immediate indefeasibility. This was confirmed by the Federal Court in *Mohammad bin Buyong v. Pemungut Hasil Tanah Gombak & Others* [1981] 1 LNS 114. This is further reinforced by the Supreme Court's decision in *M &* I *J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14. There the Supreme Court, comprising of Abdul Hamid Omar LP, Edgar Joseph Jr and Wan Yahya

SCJJ held that indefeasibility can be rebutted not only by fraud but also in cases where registration is obtained by the use of an insufficient or void instrument or where the title or interest is unlawfully acquired.

[18] The principle of immediate indefeasibility expounded in *Adorna* case in relation to s. 340 of NLC has since been held to be bad law in the recent Federal Court's decision in *Tan Ying Hong v. Tan Sian San & Ors (supra)* where through the judgment of the Arriffin Zakaria CJM held that s. 340(3) of the NLC creates a deferred indefeasibility concept on its plain reading of the words contained therein. Gopal Sri Ram JCA (as he then was) in the Court of Appeal in *Adorna* case had put it this way:

It follows from what we have said in the preceding paragraph - and this is the fourth reason we advance for disagreeing with the learned Judge - that s. 340 is constructed in such a fashion as to make defeasible only the title of the immediate acquirer of land. The section, however, protects a purchaser who, in good faith and for valuable consideration, acquires title to land. It also protects the successors in title of such a purchaser. In our judgment, the words "any purchaser" appearing in the proviso to s. 340(3) do not include a registered proprietor whose immediate title is rendered defeasible by one or more of the vitiating elements specified in the second sub-s. to s. 340 of the Code. Any other construction would, in our view, denude sub-s. (2) of all effect. The section should be read as making defeasible the title of a proprietor who gets onto the register by means of one or more of the methods specified in the second subsection. However, if such a registered proprietor were to dispose of the land to a third party who, in good faith pays the purchase price, then, the latter, as well as all those who come onto the register after him, take title free of any taint.

[19] The issue which now arises is this:

In the context of the Sabah Land Ordinance (SLO) which concept applies - immediate indefeasibility or deferred indefeasibility?

[20] The context which I am alluding to is that there is no provision for indefeasibility of title on registration in the Sabah Land Ordinance (SLO) similar to that of s. 340 of NLC. Hence whatever is said in the recent case of *Tan Ying Hong v. Tan Sian San & Ors* cannot be adopted or used in determining what type of indefeasibility the SLO envisages. That said and as rightly pointed out by the learned judge in *Ng Thau Shing v. George Justine*

& Other Cases [2005] 6 CLJ 80 HC it makes no difference when there is a forged instrument and he relied on what Gopal Sri Ram JCA (as he then was) said in the Court of Appeal in the *Adorna* case and it is this:

> ... it is axiomatic that a forged instrument is null and void and of no effect (see *Kreditbank Cassel GMBH v. Schenkers Ltd* [1927] 1 KB 826 at p 834, per Bankes LJ). It is not merely voidable. In the absence of an express statutory direction to the contrary, no rights whatsoever arise in favour of one who acquires title under a void instrument. The extent to which statute has intervened in the case of a registration of title obtained by means of a forged instrument is a matter that we will deal separately at a later stage.

[21] From that passage one can deduce that unless there is statutory intervention, title obtained by forgery is a void instrument. Hence irrespective whether the purchaser is an immediate or subsequent one, he or she acquires no rights. Parliament has seen fit to create this concept of indefeasibility and s. 340 of the NLC is a perfect example of that statutory intervention. As stated earlier, there is no such direct intervention in the SLO which unfortunately leaves the arduous duty to the court to look behind the words of the SLO to determine the intention of the law makers of the State of Sabah. Fortunately I have the judgment of the Supreme Court in *Borneo Housing Mortgage Finance Berhad v. Times Engineering Berhad* [1996] 2 CLJ 561 to guide me in my task. Through the judgment of Edgar Joseph Jr FCJ, the Federal Court held that the SLO is a modified Torrens system and this is how he puts it:

> Whether the system of land tenure in Sabah is based upon the Torrens registration system?
>
> Nowhere in the Land Ordinance is there any provision conferring indefeasibility of title to or interests in land which is a feature of central importance to the Torrens system of land registration. This is to be contrasted with the position in Peninsular Malaysia and Sarawak, where there are express provisions conferring such indefeasibility. (See s. 92(1) and s. 340 of the National Land Code, 1965, and s. 131 Sarawak Land Code (Cap 81), respectively.) Moreover, in Sabah unlike Peninsular Malaysia and Sarawak, in appropriate circumstances, the doctrine of adverse possession, may be invoked against private owners of land. (See s. 6 of the Sabah Land Ordinance (Cap 68) which merely bars any claim to any right, title or interest in State land only based on adverse possession thereof). Nevertheless, in *Chua Hee Hung*

& Ors v. QBE Supreme Insurance Bhd [1990] 1 MLJ 480, the Supreme Court, speaking through Lee Hun Hoe CJ, said (at p. 6 484 col. 1 F), though without discussion:

> In our view, since the Sabah Land Ordinance and the National Land Code are modelled on the Torrens System, the vendor/trustee relationship applicable in Peninsular Malaysia should be equally applicable in Sabah ...

Similarly, in the earlier case of *Lin Nyuk Chan v. Wong Sz Tsin* [1964] MLJ 12 200, the old Federal Court, which comprised Thomson LP, Wee Chong Jin CJ (Singapore) and Wylie CJ (Borneo), at a time when our Apex Court was still the Privy Council, expressed the view that the Land Ordinance provides for a modified Torrens system of land registration. This is how Wylie CJ (Borneo) speaking for the Court put it:

> Section 88 of the Land Ordinance reads as follows:
>
> "No new title and no dealing with, claim to or interest in any land except, land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part".
>
> Part V of the Land Ordinance provides for a modified Torrens system of land registration in Sabah and this section corresponds to the provision necessary in this system to ensure that no title to interests in land shall pass until the dealing has been registered. The language employed is somewhat different from that used in the majority of systems in use in the Commonwealth. The usual provision is to the effect that no instrument shall be effectual to pass any interest in land without registration and that, upon registration, the interest shall pass. See section 27 of the Land Titles Ordinance, 1956 of Singapore for an illustration, and also the reference to the number of jurisdictions in which this provision exists set out in page 116 of Hogg's Registration of Title to Land Throughout the Empire. In nearly all jurisdictions, however, notwithstanding variations in the language used, it has been held that these provisions do not render unenforceable contracts or agreements which would lead up to the execution and registration of instruments. Even the unregistered instrument itself may give a title in equity and an equitable right to enforce the agreement which must have existed between the parties when the instrument was executed. See *Abigail v. Lapin* [1934] ACCUSED 491. Section 4 of the Selangor Registration of Titles Regulation

A 1891, employed what is probably the most sweeping language used in these provisions. That section provided that land comprised in a grant shall not be capable of being dealt with except in accordance with the statutory provisions and that 'any attempt' to deal with land except in this manner 'shall be null and void and of no effect'. Nevertheless, in *Haji Abdul Rahman v. Mohamed Hassan* [1917] AC 209. 1 FMSLR 290, the Judicial Committee of the Privy Council held that an agreement, not in registrable form, to transfer back certain land upon a certain contingency happening, while 'valueless as a transfer or burdening instrument,' (p. 215) was good as a contract. It was said that it was not an 'attempt to transfer, but a conditional promise to transfer.' (p. 214). The language of s. 88 is not nearly as sweeping as that of the Selangor provision.

Moreover, its effect is confined to a new title or a dealing with claim to, or interest in land. Following the foregoing authorities, and others too numerous to mention, in my judgment s. 88 does not affect contracts or agreements otherwise valid and enforceable. As was pointed out in *Abigail*'s case (p. 500), the provision for protection of unregistered interests by caveats shows that the legislation does not attempt to render all unregistered interests non-existent. What it does, is to prohibit the acquisition of a legal estate or interest in land except by registration of an instrument in the statutory form. Section 116 of the Land Ordinance of Sabah makes the usual provision for caveats which may be registered by any person claiming to be entitled to any interest in any land. Obviously, such a provision is inconsistent with any interpretation of s. 88 which involves holding that any agreements or other documents affecting land are of no effect and that only registration of the dealing in the land is to have legal validity at all.

For these reasons. I hold that s. 88, notwithstanding the variation in language from that used in most jurisdictions, does not render this agreement for a lease invalid or unenforceable.

Indeed, other considerations apart, the provisions of s. 88 make it imperative in my view that there should be an order for specific performance, including an order that the respondent execute a registrable memorandum of sublease embodying the terms of the agreement and do all other acts necessary to enable registration to be effected. For, in this agreement, she has agreed to let these premises for fifteen

> years and, having regard to the provision of s. 88, the only manner in which the law of Sabah permits her to vest in the appellant the interest she has thus agreed to grant to him, is by doing those acts necessary to register the dealing.

With respect, we are unable to agree with Lee Hun Hoe CJ (Borneo) when he said in Chua Hee Hung that the Land Ordinance, like the National Land Code, is modelled on the Torrens System.

We say so because, unlike the National Land Code, there is no provision in the Land Ordinance conferring indefeasibility of title or interests in land on registration which is a feature of central importance to the Torrens system of land registration. However, s. 88 which emphasises the paramount importance of registration in accordance with Part V of the Land Ordinance as a condition precedent for the recognition of the validity of title or dealing or claim to or interest in any land (except land still held under native customary tenure without documentary title) does, in our view, imply the basic Torrens concept that title to or interest in land vests and divests only upon registration. Moreover, the provisions of s. 116 of the Land Ordinance regarding the role of the caveat in giving notice of claim against the registered title, points to the same conclusion. We therefore agree with the view of the old Federal Court, speaking through Wylie CJ (Borneo) in Lin Nyuk Chan, that the Sabah Land Ordinance (Cap 68) provides for a modified Torrens system of land registration.

It follows, therefore, that the Peninsular Malaysian cases such as *Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors* [1983] 1 MLJ 81, *Buxton & Anor v. Supreme Finance (M) Bhd* [1992] 2 MLJ 481 and *M & J Frozen Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 1 MLJ 294: *Perwira Habib Bank (M) Bhd v. Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54, with their emphasis on the indefeasibility of the chargee's registered title, guaranteed by s. 340 of the National Land Code subject only to the exceptions of fraud or misrepresentation, or where registration has been obtained by forgery or by means of an insufficient or void instrument or where title or interest has been unlawfully acquired, were of no direct relevance to the issues which arose for decision in the present appeal though, of course, the Finance Company chargee could derive analogical support therefrom.

[22] From the above, it is clear that the concept of indefeasibility is entrenched in a Torrens system and since SLO though modified is still a Torrens system, the concept of indefeasibility through s. 88 of SLO can be said to be part of the SLO regime. What is

not clear is whether it is immediate or deferred indefeasibility. The case of *Frazer v. Walker and Others* [1967] 1 All ER 649 is often quoted as authority for the concept of the immediate indefeasibility and in fact relied on by the Federal Court in *Adorna* case and *Doshi v. Yeoh Tiong Lay* [1974] 1 LNS 30. That concept as stated earlier does not apply in NLC because that decision was based on a different statute. That said, as the SLO does not have a similar provision as s. 340 NLC, it may be instructive to look at the rationale of that decision. The relevant provision of Land Transfer Act 1952 of New Zealand is s. 183(1) which reads as follows:

> Nothing in this Act shall be so interpreted as to render subject to action for recovery of damages, or for possession, or to deprivation of the estate or interest in respect of which he is registered as proprietor, any purchaser or mortgagee *bona fide* for valuable consideration of land under the provisions of this Act on the ground that his vendor or mortgagor may have been registered as proprietor through fraud or error, or under any void or voidable instrument, or may have derived from or through a person registered as proprietor through fraud or error, or under any void or voidable instrument, and this whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever.

Lord Wilberforce in constructing s. 181(3) said this:

> The leading case as to the rights of a person whose name has been entered on the register without fraud in respect of an estate or interest is the decision of this Board in *Assets Co., Ltd. v. Mere Roihi* (3). The Board there was concerned with three consolidated appeals from the Court of Appeal in New Zealand, which had decided in each case in favour of certain aboriginal natives as against the registered proprietors. In each appeal their lordships decided that registration was conclusive to confer on the appellants a title unimpeachable by the respondents. The facts involved in each of the appeals were complicated and not identical one with another, a circumstance which has given rise to some difference of opinion as to the precise *ratio decidendi* – that main relevant difference being whether the decision established the indefeasibility of title of a registered proprietor who acquired his interest under a void instrument, or whether it is only a *bona fide* purchaser from such a proprietor whose title is indefeasible. In *Boyd v. Wellington Corpn.* (4) the majority of the Court of Appeal in New Zealand held in favour of the former view, and treated the *Assets Co.* case (3) as a decision to that effect. The decision in *Boyd v. Wellington Corpn.* (4) related to a very special situation, namely

that of a registered proprietor who acquired his title under a void proclamation, but, with certain reservations as to the case of forgery, it has been generally accepted and followed in New Zealand as establishing, with the supporting authority of the *Assets Co.* case (3), the indefeasibility of the title of registered proprietors derived from void instruments generally.

Their lordships are of opinion that this conclusion is in accordance with the interpretation to be placed on those sections of the Land Transfer Act, 1952 which they have examined. They consider that *Boyd*'s case (4) was rightly decided and that the ratio of the decision applies as regards titles derived from registration of void instruments generally. As regards all such instruments it established that registration is effective to vest and to divest title and to protect the registered proprietor against adverse claims.

[23] In view of the presence of the words 'under any void or voidable instrument' in s. 183(1), it is understandable why the Privy Council had upheld the concept of immediate indefeasibility. Those words are not present in s. 88 of SLO; hence it would be unwise to adopt what was stated by their Lordships in *Frazer v. Walker*. My research reveals that there is no decided case directly on this issue in this part of the world but it did unearth the case of *Gibbs v. Messer* [1891] AC 248 where Lord Watson at p. 254-255 justifies the concept of deferred indefeasibility in this way:

... The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in *bona fide* and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title. In the present case, if Hugh Cameron had been a real person whose name was fraudulently registered by Cresswell, his certificates of title, so long as he remained undivested by the issue of new certificates to a *bona fide* transferee, would have been liable to cancellation at the instance of Mrs. Messer; but a mortgage executed by Cameron himself, in the knowledge of Cresswell's fraud, would have constituted a valid incumbrance in favour of a *bona fide* mortgagee. **The protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses**

> **his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration**. (emphasis added)

[24] I agree and adopt what is stated by Lord Watson. I also agree with the words of reasons of Gopal Sri Ram JCA (as he then was) in the case of *Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors* [2005] 3 CLJ 539 where he gave his reasons why *Adorna* judgment or the concept of immediate indefeasibility should not be followed and they are these:

> I take this view because the consequences of the judgment of *Adorna Properties* are startling. As a registered proprietor, you can cling on to your issue title document of title for dear life. Yet a rogue may by use of forged documents obtain a duplicate of the issue document of title claiming the original to be lost and sell and transfer your land to a perfectly innocent purchaser. Yet, according to the judgment of the Federal Court you cannot recover your property

[25] There is another reason why the SLO should be interpreted to embrace the concept of deferred indefeasibility and that is it would not be in the interest of the country's trade and commerce if we have a different set of law for the State of Sabah to that of Peninsular Malaysia especially for land matters. Though the court is discouraged from using policy consideration in interpreting statute, this is one instance where the exception to the rule should rule the day.

[26] In the present case, there is no dispute that the defendants had been dealing with the forger in getting themselves registered as legal owners and in applying the deferred indefeasibility concept, I have no option but to hold that the title of the defendants to the property to be defeasible.

[27] Accordingly I make the following orders:

(a) An order that the transfer of CL015029213 effected under the Memorandum of Transfer dated 25 March 2004 to the 1st and 4th defendant be set aside and annulled on grounds of forgery;

(b) An order directing the 5th defendant to expunge from the register and records at the Central Land Office the registration of the said Transfer dated 25 March 2004 and any dealings effected by the 1st to 4th defendants after 25 March 2004;

(c) A declaration that the plaintiffs are the registered co-owners of CL015029213 on 25 March 2004;

(d) Order that the 1st to 4th defendants jointly and severally do deliver up the issued copy of the titled deed for CL015029213 to the plaintiff within fourteen (14) days from the date of this judgment.

(e) Costs to be taxed unless agreed is awarded to the plaintiffs.

[28] Before I deal with the next issue, let me state the obvious and that is in a forgery of this nature, one innocent party is bound to suffer. It is either the registered owner or the *bona fide* purchaser for value and without notice. The learned Chief Justice of the Federal Court in *Tan Ying Hong v. Tan Sian San & Ors (supra)* after stating that Federal Court decision in *Adorna Properties* was wrong said this:

> [11] I hope that with this decision, the Land Authorities will be extra cautious when registering transfers

[29] I associate myself to that statement and wish to add that the relevant authority should seriously look into the setting of an assurance fund to compensate for any loss to any innocent purchasers resulting from forgery similar in this case and the *Adorna Properties*. Only with this fund can one say that the Torrens system guarantees the absolute and indefeasible title of a registered owner. This fund can be funded by the users of the Land Registry by imposing a levy of say a sum of RM10 for each transaction. In the context of the SLO, I also urge that the relevant authority seriously look into amending the SLO to include a specific provision on 'indefeasibility of registered title' so that the State will have a truly Torrens system as opposed to a modified Torrens system which with respect is neither here or there. With that I move to the last issue.

A **Issue 2**

Whether The Third Party Was Negligent In The Handling Of The Sale Transaction Of The Land?

B **[30]** The third party was made a party to this suit by the defendants and their claim is basically to be indemnified for any loss they may suffer if the court finds for the plaintiffs.

[31] The preliminary question which needs to be addressed is whether the third party owes a duty of care to the defendants. It C is undisputed that both the plaintiffs and the defendants had engaged different solicitors to act for them in respect of the legal documents for the sale and purchase of the property. The third party acted for the plaintiffs (though denied by the plaintiffs) while DW2 acted for the defendants. That being the case, the third D party owes no duty of care be it in tort or contract to the defendants. In tort, there is no relationship of proximity between the third party and the defendants. In contract, the defendants had no retainer with the third party. The only person who had relationship of proximity and a retainer with the defendants is E DW2 and as he is not a party to this suit, the court is prohibited from making any finding on that relationship.

[32] Further as the defendants had engaged DW2 as their solicitors, the question of representation by third party that certain F legal documents are proper does not arise in so far as his dealing with the defendants is concerned. That due diligence exercise should have been done by the third party for the defendants is a non starter. It would be a different scenario if the third party was acting on behalf of the plaintiffs and the defendants which in this G matter is not the case here.

[33] In a nutshell, the claim by the defendants against the third party is misplaced and accordingly dismissed with costs to be taxed unless agreed to the third party.

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